IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.1327 OF 1996.

Smt.Ratan Arun Satpute & Ors. ...Appellants

Vs.

Ashok Changdev Ghogare & Anr. ...Respondents

Mr. C.M.Lokesh for the Appellants
Mr. S.G.Deshpande for the Respondent No.3.

CORAM: A.S.OKA, J.
DATED: MARCH 10,2006.

ORAL JUDGMENT:

1. The Appellants who are the original claimants in the Motor Accident Claim under section 166 of the Motor Vehicles Act, 1988 (hereinafter referred to as the said Act of 1988) have preferred this Appeal. The prayer of the Appellants in this Appeal is of seeking enhancement in compensation which is already awarded to the Appellants by the impugned Judgment and Award.

2. With a view to appreciate the submissions made by the Advocate for the parties, it will be necessary to refer to the facts of the case in brief. The Appellant No.1 is the widow of the deceased and the Appellant No.2 to 6 are his children who were minor at the time of the accident and at the time of filing of the Claim Petition. The Appellant No.7 is the father of the deceased and Appellant No.8 is the mother of the deceased. The age of the deceased at the time of the accident was 37 years. The case of the Appellants is

that the deceased was having agricultural land and grocery business and he was earning Rs.4000/- p.m. at the time of his death.

3. On 21st July 1991 the deceased was proceeding on a motor cycle as a pillion rider on the way to Akluj. When the motor cycle came near Anandnagar, one jeep came in opposite side in a very high speed and dashed against the motor cycle. According to the Appellants, the jeep was coming from wrong side and gave a dash to the motor cycle. The Respondent No.1 was the driver of the jeep at the relevant time and the Respondent No.2 was the owner. The Respondent No.3 is the Insurance Company with which the jeep was validly insured at the relevant time.

4. Respondent Nos.1 and 2 filed written statement and opposed the Claim Petition. The contention of the Respondent Nos.1 and 2 is that there was no negligence on the part of the Respondent No.1 and the accident occurred because of the rash and negligent driving on the part of one Parshuram who was driving the motorcycle. The Respondent No.3 also opposed the Claim by filing the written statement. It is contended that negligence was on the part of the person who was driving the motorcycle. The Insurance Company did not dispute that on the date of the accident, the jeep involved in the accident was validly insured with it.

5. By the impugned Judgment and Award the learned Member of the Tribunal held that the accident occurred due to rash and negligent driving on the part of the driver of the jeep. The learned Member of the Tribunal held that the driver of the motor cycle had not contributed to the accident. The learned Member of the Tribunal disbelieved the case of the Appellants that the income of the deceased was Rs.4000/- p.m. and granted compensation by taking the income of the deceased at Rs.750/- p.m. The compensation of Rs.1,05,000/- along with interest at the rate of 12% p.a. has been awarded to the Appellants. The compensation amount is inclusive of no fault liability.

6. The learned Advocate for the Appellants invited my attention to the documentary evidence on record. He submitted that the deceased was holding vast agricultural lands and on one agricultural land sugar-cane was grown. He invited my attention to the evidence of the widow of the deceased and submitted that the case of the Appellants ought to have been accepted so far as the income is concerned.

7. None appears for the Respondent Nos.1 and 2. Shri Deshpande appearing for Respondent No.3 submitted that there is absolutely no evidence of the income of the deceased. He submitted that as the deceased was agriculturist holding agricultural land, even after his demise the agricultural land and income therefrom is very much available to the

Appellants. He submitted that without filing cross objection the Respondent No.3 is entitled to challenge the findings recorded by the Tribunal regarding the issue of the negligence. He submitted that the driver of the vehicle insured with the Respondent No.3 was not at all negligent.

8. I have considered the submissions. Shri Deshpande for Respondent No.3 tried to assail the findings recorded by the Tribunal on the issue of negligence and submitted that the negligence on the part of the driver of the vehicle insured with the Respondent No.3 Insurance Company is not established. He submitted that the provisions of Order XLI of the Code of Civil Procedure, 1908 will apply to the Appeal preferred to this Court under the Motor Vehicles Act, 1988. He therefore submitted that without filing cross objections, he can assail the finding on the issue of the negligence recorded by the Tribunal.

9. It is not necessary to enter into the wider question whether all the provisions of Order XLI of the said Code will apply to the Appeal preferred under Section 173 of the said Act of 1988. Even assuming that to this Appeal the provisions of Order XLI will apply, it will be necessary to refer to sub Rule 1 of Rule 22 of Order XLI of the said Code which reads thus :

"22. Upon hearing, respondent may object to decree as if

he had preferred separate appeal -

(1) Any respondent, though he may not have appealed from any part of the decree, may not only support the decree [but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour; and may also take any cross-objection] to the decree which he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one month from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such further time as the Appellate Court may see fit to allow.

[Explanation- A respondent aggrieved by a finding of the Court in the judgment on which the decree appealed against is based may, under this rule, file cross-objection in respect of the decree in so far it is based on that finding, notwithstanding that by reason of the decision of the Court on any other finding which is sufficient for the decision of the suit, the decree, is wholly or in part, in favour of that that respondent.]"

Rule 1 is an enabling the provision which enables a party respondent to an Appeal who has not challenged any part of the decree to the challenge a finding recorded against him without preferring either an Appeal or a cross objection. It must be borne in mind that a decree can be challenged only by preferring an Appeal or cross objection. The submission of Shri Deshpande is that the finding on the issue of negligence can be challenged without filing cross objection or Appeal. The Tribunal has held that the owner of the jeep is liable for payment of compensation on the ground that the accident occurred due to rash and negligent driving on the part of the driver of the concerned jeep. As the owner and driver are held liable to pay compensation, Respondent No.3 being insurer of the vehicle is under an obligation to satisfy the

award made against the owner and the driver. Therefore, when a plea is made that the finding on the issue of negligence recorded against the driver is erroneous it is in substance a plea to the effect that the Award made against the Respondent No.1 and 2 should be set aside and in turn the Award against the Respondent No.3 should be set aside. Thus, by making these submissions, in substance, Shri Deshpande desires to challenge the Award made against the Insurance Company. He cannot be permitted to do so without filing cross objection. Only if the Award of the Tribunal was in favour of the Respondent No.3, the enabling provisions of Order XLI Rule 22 will permit an adverse finding to be challenged without filing cross objection.

10. In my view, the Insurance Company could have challenged any part of the Award made against it only by preferring an Appeal or by filing a cross objection. Moreover, Appeal or cross objection will be subject to the limitation imposed by Section 173 of the said Act of 1988. Thus, an Appeal or a cross objection could have been filed provided either the Insurance Company had taken a defence covered by Section 149 (2) of the said Act of 1988 or the Insurance Company was granted leave to defend the claim on behalf of the insured. In the present case both the grounds are not available to the Respondent No.3. If the Respondent No.3 is allowed to challenge the finding in this Appeal without filing Appeal or cross objection, it will completely defeat the object of

Section 173 of the said Act of 1988.

11. Hence, I have not considered the submissions made by the Shri Deshpande on the issue of negligence. Shri Deshpande submitted that even under Rule 33 of Order XLI, this Court is empowered to pass any decree which ought to have been passed or made notwithstanding the fact that the Respondent No.3 has not preferred any Appeal. It is well settled principle that power under Rule 33 of Order XLI is purely discretionary. When the legislature has thought it fit to confer a restricted right on insurer to prefer an Appeal, discretion under Rule 33 cannot be exercised in favour of the Insurance Company in an Appeal of the year 1996 preferred to challenge the Award passed in a Claim Petition of the year 1991. Hence, the said prayer made by Shri Deshpande cannot be considered.

12. Turning to the quantum of compensation, the case of the Appellants was that the deceased was earning a sum of Rs.2000/- p.m. by way of income from agriculture and Rs.2000/- p.m. from the grocery business. In the examination-in-chief the widow of the deceased has deposed to that effect. She was cross examined by the Advocate for the Respondent No.3-Insurance Company. In the examination-in chief there is a categorical assertions made that the deceased used to get Rs.2000/- p.m. from the business and Rs.2000/- p.m. from the agriculture. A suggestion was given

by the Advocate for the Insurance Company in the cross examination that the deceased was not running the business and was not getting Rs.2000/- p.m. from the grocery business. There is no specific suggestion given by the said Advocate that the deceased was not earning any income from the agriculture. The only suggestion given is that the deceased was not holding any agricultural land. Perusal of the record and in particular the certified copies of 7/12 extracts at Exh.61 and 62 shows that the deceased was holding two separate parcels of agricultural lands. Document at Exh.63 which is the certificate issued by Hanuman Bhima Sahkari Pani Purvata Seva Sanstha Ltd. indicates that both the lands were irrigated lands. One of the lands was having area of 1H 20 R. The 7/12 extract of the said land shows that there was no Pot Kharaba in the said land. 7/12 extract also shows that crop was being regularly taken. On the other land held by the deceased sugarcane crop is shown to have been taken in the cultivation column of the 7/12 extract. As stated earlier the lands are irrigated lands. Shri Deshpande tried to argue that 7/12 extracts were produced after recording of the evidence and therefore the same cannot be considered. However, the record shows that the documents were produced on 23rd January 1996 along with a list and the Advocate for the Respondents gave consent in writing for exhibiting the said documents as the same were public documents. Thus, the 7/12 extracts and the certificate issued by the said Society were admitted in the evidence by

the consent of the parties. Hence, the said documents will have to be read in evidence.

13. Considering these documents and very limited cross examination by the Advocate for the Insurance Company on the income received by the deceased from the agriculture, the income taken by the learned Member of Rs.750/- p.m. is certainly on the lower side. The claim petition is of the year 1991. While arriving the figure of just and reasonable compensation, some element of guess work always exists. Considering the fact that the deceased was taking sugar cane crop, it is reasonable to take monthly income of the deceased at Rs.1200/- p.m. After deducting 1/3rd amount for his personal expenditure, yearly amount comes to Rs.9600/-. Considering the age of the deceased and the circumstances of the case the Tribunal has applied multiplier of 15. Applying multiplier of 15, the total compensation works out to be Rs.1,44,000/- The Tribunal has awarded Rs.7500/- for loss of love and affection and for consortium. On this account a sum of Rs.15,000/- ought to have been award. Thus, taking a round figure, the total compensation will be Rs. 1,60,000/-. To that extent the impugned Award will have to be modified. Shri Deshpande argued that even after demise of the deceased, the agricultural income must be the same and therefore, there is no loss of the income. On the date of death of the deceased the minor children were in the age group of 1 to 12 years. The only adult male member of the family of the

deceased at the time of accident was his 60 year of old father. Therefore, it is not possible to come to the conclusion that the such persons can carry on the agricultural operations and earn income.

14. Hence I pass the following order

i) Impugned Judgment and Award is modified and the total compensation payable will be Rs.1,60,000/- in stead of Rs.1,05,000/- together with interest at the rate of 12% p.a. from the date of filing claim petition till realisation of the amount.

ii) Rest of the Award is maintained.

iii) The Appellants will be entitled to proportionate costs of this Appeal from the Respondents.

iv) The Respondents are granted time of three months to comply with this order.

Judge.